No. 17-494

IN THE

Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of South Dakota

BRIEF OF CHRIS COX, FORMER MEMBER OF CONGRESS AND CO-AUTHOR OF THE INTERNET TAX FREEDOM ACT, AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Chris Cox is a former United States Representative (R-CA), who with current United States Senator Ron Wyden (D-OR) is the co-author of the Internet Tax Freedom Act, Pub. L. No. 105–277, § 1100, 112 Stat. 2681-719 (1998) (made permanent in Pub. L. No. 114–125, § 922(a), 130 Stat. 281, on February 24, 2016 (codified at 47 U.S.C. § 151 note)).

The Internet Tax Freedom Act establishes federal policy regarding Federal and State taxation of the internet, based upon its unique characteristics as a mode of interstate and global commerce uniquely susceptible to multiple and discriminatory taxation. The Act also establishes a process by which Congress and the States can address the subject of State efforts to impose sales and use tax collection responsibilities on out-of-state vendors who rely exclusively upon the internet, the mails, the telephone, and other instrumentalities of interstate commerce to fulfill orders. Amicus has been a leading participant in that ongoing process and in congressional deliberations on these issues. He is thus able to bring to the attention of the Court

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represent that they authored this brief in its entirety. No counsel for a party authored this brief in whole or in part, and no counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief. eBay, a leading e-commerce business that provides a platform for small internet retailers, contributed funds for the preparation or submission of this brief. Counsel for *amicus* also represent that all parties have consented to the filing of this brief and that the parties were timely notified of his intent to file this brief.

relevant matters not already addressed by the parties.

SUMMARY OF ARGUMENT

Congress, exercising its authority over interstate commerce, enacted the Internet Tax Freedom Act ("ITFA") in 1998. The law was made permanent in 2016. The principal purpose of the ITFA is to prevent commerce over the internet—uniquely interstate because of its decentralized, packet-switched architecture—from being subjected to multiple and discriminatory taxation across a confusing patchwork of thousands of state and local taxing jurisdictions. To this end, state and local governments are prohibited from imposing taxes directly on the internet or online activity. The ITFA categorizes taxes targeted specifically to the Internet itself or to online commerce as "discriminatory." Discriminatory taxes are outlawed by the ITFA.

The ITFA prohibits States from establishing unique tax rules for internet transactions. It applies to "any tax imposed by a State or political subdivision thereof on electronic commerce." Any such tax is a "discriminatory tax" and therefore banned if it is imposed differently, or if the obligation to collect or pay it is assigned to a different person, "than in the case of transactions involving similar property, goods, services, or information accomplished through other means" than via the internet.[2]

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[2] ITFA §§ 1105(2)(A)(i), (iii).

South Dakota enacted a law that it has acknowledged violates this Court's precedent, for the transparent purpose of provoking litigation that, it hoped, would lead to a forum in this Court. Not surprisingly, South Dakota's was a losing effort in both that State's Circuit Court and Supreme Court. But the law that has thus far been held unconstitutional has other deficiencies, as well, arising from the fact that it would impose unique, discriminatory burdens on internet transactions that in-state retailers would not be required to bear, in violation of the ITFA.

South Dakota's argument is purely policy-based. Even as Congress is in the midst of robust debate concerning how best to protect the interests of the several States in taxing their own citizens on purchases made over the internet, South Dakota wishes to impose its preferred solution upon the entire Nation through the repeal of this Court's long-standing precedent of *Quill Corp.* v. *North Dakota*, 504 U.S. 298 (1992). South Dakota's favored approach would give it new power to tax and regulate out-of-state persons. Unavoidably, it would give the same power to every one of the 46 States with sales and use taxes, as well as thousands of differentiated taxing sub-jurisdictions. Under this new regime, an out-of-state business that sells over the internet would have to comply with the conflicting rules of thousands of taxing jurisdictions. The non-internet merchant would not. This is precisely the discriminatory burden ITFA sought to avoid as a matter of national policy.

Because this lawsuit is a contrivance, moving directly to decision via an action for declaratory relief

and a facial evaluation of the law without meaningful discovery, there is no factual record upon which this Court can test South Dakota's policy-based claims. For example, South Dakota claims it is losing revenue because it cannot tax and regulate out-of-state persons who contact the State solely via the internet, telephone, and the mails. This oft-repeated claim is provably false, see Part III.C, *infra*, and should be subjected to challenge in the lower courts before being relied upon to overturn a precedent of this Court.

National policymaking is the role of the Congress. So is the regulation of interstate commerce. Congress has exercised its authority to establish policy in this area through the ITFA, most recently in 2016, and is currently in the midst of further legislative deliberations over the specific issue of how internet transactions involving out-of-state vendors may best be subjected to sales and use taxes. There is nothing "dormant" about Congress's currently robust exercise of its proper authority in this area. This Court should reject Petitioner's invitation to enter the policymaking arena on an issue that has long taxed the imaginations of those in Congress who have worked so hard on it.

ARGUMENT

I. THE ITFA HAS ESTABLISHED FEDERAL POLICY AGAINST MULTIPLE AND DISCRIMINATORY STATE TAXATION OF INTERNET COMMERCE.

When the Internet Tax Freedom Act ("ITFA") was signed into law by President Bill Clinton on October

21, 1998, it was a rare bipartisan accomplishment. It passed the U.S. House by unanimous consent in July 1998, H.R. 4105, 105th Cong. (1998), while the Senate companion bill, S. 442, 105th Cong. (2d Sess. 1998), passed the U.S. Senate by a vote of 96-2 in October 1998. At the conclusion of the 105th Congress, many observers viewed the ITFA as historic and one of Congress's most important and substantive accomplishments.[3]

The law, however, was never popular with State governments. Only four Governors endorsed it. The National League of Cities, the National Governors' Association, the U.S. Conference of Mayors, the National Association of Counties, and the National Conference of State Legislatures all worked against it, because all wanted to lay claim to their piece of

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[3] The detailed legislative history of the ITFA is as follows. On March 13, 1997, Rep. Cox introduced H.R. 1054, titled the "Internet Tax Freedom Act," in the U.S. House, and Sen. Wyden introduced it in the Senate, where it was designated S. 442. Subsequently, Rep. Cox introduced two updated versions: H.R. 3849, in May 1998; and H.R. 4105, in June 1998. H.R. 4105 passed the U.S. House by unanimous consent in July 1998, see H.R. 4105 – Internet Tax Freedom Act, CONGRESS.GOV, https://www.congress.gov/bill/105th-congress/house-bill/4105/all-actions, while the Senate companion bill, S. 442, passed the U.S. Senate by a vote of 96-2 in October 1998, S.442 – Internet Tax Freedom Act, CONGRESS.GOV, https://www.congress.gov/bill/105th-congress/senate-bill/442/actions. The ITFA was then added to the omnibus appropriations bill for that year, and signed into law by President Clinton as Titles XI and XII of P. L. No. 105-277, on October 21, 1998. It is codified as a note to 47 U.S.C. § 151. The ITFA as originally enacted imposed a moratorium on discriminatory taxation of electronic commerce. The law was subsequently extended on multiple occasions by Congress, and in February 2016, it was made permanent. See P. L. No. 114-125, § 992(a) (Feb. 24, 2016).

the internet. Cities had taxed and regulated cable TV as if it were a public utility, and they saw the internet as no different. But in Congress and the White House, the uniquely interstate—indeed, global—characteristics of the internet featured more prominently in policy making. In a white paper entitled "The Framework for Global Electronic Commerce," the White House pointed to "the Internet's special characteristics" as reason for its concern "about possible moves by state and local tax authorities to target electronic commerce."[4]

The policy arguments made by South Dakota in this case are the same arguments it and other States unsuccessfully made to Congress during debate over the ITFA. They, along with counties, municipalities, and territorial governments, claimed they would exert only a light touch when it came to regulatory burden; that even though there were thousands of taxing jurisdictions, the collective compliance burden would not be a problem; and that it was their prerogative as States to protect in-state commerce from the unwanted disruption of internet business models from out-of-state sellers.

These same arguments were reprised in 2016, when Congress made the ITFA permanent. Claiming this would "substantially reduce revenues" for the States, the law's original opponents from 1998—including the National Governors Association, the National Association of Counties, the National

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[4] "The Framework for Global Electronic Commerce," THE WHITE HOUSE, § I.1 (1998).

League of Cities, and the U.S. Conference of Mayors—all opposed it anew.[5]

Congress and the White House, in 1998 and 2016, believed otherwise. The specter of multiple States and municipalities all simultaneously taxing and regulating commerce on the internet was seen as the far greater concern. Congress believed the increase in GDP facilitated by internet commerce would boost state revenues, not cut them. The fact that in-state sellers would be challenged by out-of-state vendors via the internet was seen as a feature, not a bug.

As stated in the Committee Report accompanying the ITFA in the Senate, the internet "offers advantages such as providing small- and medium-sized companies the opportunity to compete with multinational conglomerates." But, the Report noted, there are thousands of state and local taxing jurisdictions in the United States, and "the potential costs of complying with the tax demands of these authorities could make use of the Internet uneconomical for such companies."[6]

In order to achieve the benefits of internet commerce through a national policy that prevents the internet from being exposed to every State's regulation and taxation, Congress enacted the ITFA.

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[5] H.R. Rep. No. 113-510, "Dissenting Views," at 16 (2014) (discussing H.R. 3086, the Permanent Internet Tax Freedom Act).

[6] S. Rep. No. 105-184, at 2-3 (1998) (discussing S. 442, the Internet Tax Freedom Act).

A. Congress Has Recognized the Unique Vulnerability of Internet Commerce to Multiple and Discriminatory Taxation.

"Most State and local commercial tax codes," the Senate Commerce Committee observed at the time of enactment of the ITFA, "were enacted prior to the development of the Internet and electronic commerce. Efforts to impose these codes without any adjustment to Internet communications, transactions or services . . . will lead to State and local taxes that are imposed in unpredictable and overly burdensome ways."[7]

The internet's decentralized, packet-switched architecture has no precedent in U.S. or global commerce. While equally revolutionary when introduced, the telephone and telegraph are point-to-point communications. There is a point of origin and a terminus. A website, in contrast, has a unique point of origin (say, a small business's garage) that is immediately and uninterruptedly exposed to billions of internet users in every U.S. jurisdiction and around the planet. This makes internet commerce, unlike mail-order sales or telephone sales, uniquely vulnerable to tax and regulatory burdens in thousands of jurisdictions.

So too does the fact that the internet is utterly indifferent to State borders. In its nearly instant transit, an email from one cubicle to another in the same office may be atomized and routed in pieces through servers in multiple States before reaching its destination a few feet away.

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[7] *Id.* at 3.

These characteristics of the internet, Congress recognized in the ITFA, would subject it to extravagant claims of nexus and a confusing patchwork of thousands of state and local taxing jurisdictions, unless federal policy remedied the situation.

B. The ITFA Specifically Prohibits Multiple and Discriminatory Taxation of Internet Commerce.

The ITFA provides that "No State . . . may impose . . . discriminatory taxes on electronic commerce."[8]

Discriminatory taxes are defined to include any tax that "is not generally imposed and legally collectible . . . on transactions involving similar property, goods, services, or information accomplished through other means."[9]

The definition also includes any state tax that "imposes an obligation to collect or pay the tax on a different person . . . than in the case of transactions . . . accomplished through other means."[10]

C. State Sales Taxes Can Violate the ITFA's Ban on Multiple and Discriminatory Taxes.

Sales taxes can, under the plain language of the law's definition, be discriminatory within the meaning of the ITFA.[11] That sales taxes were a

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[8] ITFA § 1101(a).

[9] ITFA § 1105(2)(A)(i).

[10] ITFA § 1105(2)(A)(iii).

[11] ITFA § 1105(2)(A).

particular concern of the ITFA is evident from the fact that, in crafting the law, Congress stated its express reliance upon *Quill*'s physical presence rule for nexus.[12]

Indeed, Congress openly worried that even *Quill's* bright-line test might not be enough to prevent the burdens of having to comply with the laws, rules, filing requirements, and audits of so many jurisdictions. "These traditional notions of nexus," the Senate Committee Report states, referring to *Quill*, "are difficult to apply to the Internet because of the way that Internet transactions occur."[13]

In lieu of committee reports from the House Judiciary and Energy & Commerce Committees, the statement from Rep. Cox, the author of the bill, was published in the Congressional Record ("Statement of Intent").[14] No contrary statement of intent was ever made by any co-sponsor or supporter of the ITFA in either the Senate or the House. ITFA, explains the Statement of Intent, is intended to provide "certainty" that the rules of *Quill*'s physical-presence test "will continue to apply to electronic commerce just as they apply to mail-order commerce, unless and until a future Congress decides to alter the current nexus requirements."[15]

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[12] S. Rep. No. 105-184, at 2 (1998).

[13] *Ibid.*

[14] 144 Cong. Rec. E1288-03 (June 23, 1998).

[15] *Ibid.*

II. SOUTH DAKOTA'S LAW VIOLATES BOTH THE LETTER AND THE NATIONAL POLICY AIMS OF THE ITFA.

A. The ITFA Applies to the Taxes on Internet Transactions That Are the Subject of South Dakota's Law.

As noted, the ITFA prohibits "discriminatory taxes on electronic commerce." This includes any tax imposed differently on internet commerce. The law also prohibits assigning the tax collection burden to a different person in internet and non-internet transactions.

There are two means by which a resident of South Dakota can buy goods from out-of-state sellers. She can pick up the goods herself and bring them home. Or she can have someone else do that for her.

In the first instance, South Dakota does not impose any obligation to collect or pay sales tax on the remote seller.[16] Only in the second instance, where the means of fulfilling the transaction is the internet, telephone, or the mail, does South Dakota require the remote seller to collect and pay.

In the two instances, South Dakota places the burden of tax compliance on different persons or entities. Yet both cases involve remote sellers and in-state purchasers.

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[16] This is the flip side of South Dakota's merciful treatment of its in-state retailers, who are not required to collect tax on sales to non-residents if possession is taken outside of South Dakota. See South Dakota Department of Revenue, Sales and Use Tax Guide, 3 (July 2017).

In short, the way that South Dakota has contrived its "kill *Quill*" law[17] unavoidably burdens internet remote sellers while sparing sellers of exactly the same property, goods, or services who accomplish the transaction through other means. This violates Section 1105(2)(A)(i) of the ITFA.

Similarly, by placing the burden of tax compliance and payment on the seller in the case of internet remote sales, but on the purchaser in the case of non-internet remote sales, South Dakota's law violates Section 1105(2)(A)(iii) of the ITFA.

B. South Dakota's Preferred National Policy Is Directly at Odds with the ITFA's Policy Against Multiple and Discriminatory Taxation.

In addition to violating the letter of Federal law, the South Dakota law is thoroughly inconsistent with its spirit.

First, the ITFA recognizes that internet commerce is inherently susceptible to burdensome regulation and taxation simultaneously by multiple jurisdictions in ways that offline commerce is not. It therefore bans States from what it broadly defines as discriminatory taxation.

Second, the ITFA established a Federal commission to further the policy aims of the

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[17] For a description of the "Kill *Quill*" movement among the States, see, e.g., Andrew Nehring, *Internet Sales Taxes: To Kill or Not to Kill Quill?*, WASH. EXAMINER (Apr. 7, 2017, 3:23 PM), http://www.washingtonexaminer.com/internet-sales-taxes-to-kill-or-not-to-kill-quill/article/2619704.

legislation, including the development of "model State legislation" to provide "uniform definitions of categories of property, goods, service, or information subject to or exempt from sales and use taxes." The purpose of such state legislation would be to ensure that "transactions using the Internet ... would be treated in a tax and technologically neutral manner *relative to other forms of remote sales.*"[18]

The Federal commission reported to Congress in 2000. Consistent with the ITFA itself, it recommended that States work with and through the National Conference of Commissioners on Uniform State Laws to draft "a uniform sales and use tax act" that would permit simplification of state and local sales and use taxation. This is a necessary prerequisite, the commission believed, "to creating parity of collection costs between remote sellers and comparable single-jurisdiction vendors that do not offer remote sales."[19] The commission believed five years would be a reasonable time for the States to enact such legislation.[20]

Seventeen years later, South Dakota and its sister States have effectively rejected this policy, preferring to maintain their own unique tax rules, definitions, rates, and regulations.[21] This has left

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[18] Report to Congress of the Advisory Committee on Electronic Commerce, 70 (2000), http://govinfo. library. unt.edu/ecommerce/acec_report.pdf (emphasis added).

[19] *Id.* at 5.

[20] *Id.* at 2.

[21] South Dakota and less than half of the States joined the Streamlined Sales and Use Tax Agreement, which was supposed to achieve uniformity or simplicity, but has not, even among its members.

internet sellers confronting essentially the same maze of differing state and local rules and competing definitions, deadlines, filing requirements, and audit demands that produced the ITFA in 1998 and led Congress to make the law permanent in 2016.

The national policy reflected in the ITFA is concerned with ensuring that state sales tax compliance would "not be more burdensome on a business that collects and remits taxes to several taxing jurisdictions than it is to a business that collects and remits taxes in a single taxing jurisdiction."[22] South Dakota does not share this concern. It focuses instead on the presumed competitive burden on its in-state businesses and its purported lost revenue. These arguments were rejected in the ITFA and by the commission.

The result is that South Dakota has enacted an extreme form of long-arm sales tax jurisdiction that will punish even the smallest out-of-state internet retailer.

An example will serve to illustrate.

A woman opens a small business out of her apartment in Idaho, selling iPhone cases principally over the internet. They retail for $7. She doesn't sell on Amazon because the seller account fee, referral fee, and closing fee together would amount to nearly half the retail price—and she would still be responsible for the packing and shipping costs. So she sells via her own web storefront.

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[22] Report to Congress of the Advisory Committee on Electronic Commerce, *supra*, at 2.

Her customers are mostly in the United States and Canada. In a typical week she fills orders primarily to New York, Florida, Texas, Illinois, Colorado, and California, with gross annual sales of $273,000. She rarely sells to customers in South Dakota—maybe four iPhone cases in an entire week. Her net income is $1.49 per phone case. On those South Dakota sales, therefore, she earns $309 in a year.

Because she lives and works in Idaho, she is registered with the Idaho State Tax Commission, the Idaho Department of Labor, and the Idaho Industrial Commission. She has paid the Idaho State Tax Commission for a seller's permit, and regularly files Idaho sales tax returns. Compliance with Idaho's rules requires her, like other businesses in Idaho, to be familiar with the State's varying tax rates and definitions of what is taxable, its audit and recordkeeping requirements, and its filing requirements (in her case, the requirement to file monthly sales tax reports).

As challenging as these regulatory burdens may be, at least they are the same for every similarly situated business in Idaho. The discrimination begins once she is required to comply not only with Idaho's rules, where she lives and works, but with the rules and burdens imposed by 46 different States. Forcing one small business, with one location, to bear this burden is discriminatory when a large in-state retailer has no such burden. The sole basis for this discrimination is that the Idaho seller uses the internet to fill orders for shipment out of state. This violates the ITFA.

Yet South Dakota's law would claim full tax and regulatory jurisdiction over the woman in this example. Despite her *de minimis* sales into South Dakota, her relatively few shipments into the State will subject her to the licensing, registration, audit, and fee-paying requirements of the South Dakota Department of Revenue.[23]

South Dakota approvingly reports that "many other States have [enacted] provisions materially identical to South Dakota's,"[24] meaning that if this Court upholds the contested law in this case, even the smallest internet sellers will quickly be subject to nationwide compliance burdens and the competing rules, filing requirements and audit demands of over 12,000 taxing jurisdictions. This would be directly at odds with the ITFA's policy against multiple and discriminatory taxation.

III. SOUTH DAKOTA'S PETITION IS NOT A LEGAL, BUT A POLICY ARGUMENT.

South Dakota seeks, by reversal of clearly established Supreme Court precedent, to win in the courts what it has been unable to win in Congress. If South Dakota succeeds, it will effectively neuter the national policy established by Congress in the ITFA. Once every website that fills orders nationally has to comply separately with the local tax laws, rules, regulations, filing and audit requirements of 46 States, and once millions of individual sellers with a website find themselves liable to summons and the *in personam* jurisdiction of those States, it will be South

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[23] S.B. 106, 2016 Legis. Assemb., 91st Sess. § 1(2) (S.D. 2016).

[24] Pet. at 8.

Dakota's preferred national policy, not Congress's, that prevails.

A. This Action Provides No Factual Record to Support South Dakota's Alternative National Policy for Interstate Commerce.

It is not merely that South Dakota's legislative policy argument should be addressed to the Congress rather than the Court (though it should). Even were this Court a legislature, it would require an opportunity to weigh competing data on various sides of the policy argument. This case, because of the barren factual record produced by the state legislature's express-to-the-U.S. Supreme Court gimmick, has no meaningful findings of fact whatever.

Petitioner points to the "detailed findings" in the South Dakota law.[25] Except for a few naked conclusions, however, there are none. The law's Section 8 claims without proof that the status quo is "causing revenue losses and imminent harm." As demonstrated below, this is untrue—South Dakota's sales tax revenue is increasing.

The law's other relevant "finding" is that South Dakota's proposed tax compliance burdens, including the long-arm assertion of *in personam* jurisdiction, are "neither unusually difficult nor burdensome for remote sellers." Here, too, the record is barren. The fact is that mid-market internet retailers would have to spend $80,000 to $290,000 in integration costs just to use the "free" sales tax software discussed by

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[25] Pet. at 6.

Petitioner. Each year thereafter, they would incur costs between $57,500 and $260,000 for maintenance, updates, audits, and service fees.[26] Beyond this, a retailer with a single place of business would face further compliance burdens in the form of monthly, quarterly, and annual filings not just in South Dakota but every one of the 46 States with a sales tax that chooses to follow in its footsteps, should South Dakota's law be upheld.

B. South Dakota's Policy Argument Is Based Upon a False Premise: Its Sales Tax Revenue Has Been Growing Rapidly, Not Shrinking.

"Internet sales," reports the Supreme Court of South Dakota in this case, "have risen," while "state revenues have decreased." The sole source for this questionable assertion is the "finding" to that effect in the South Dakota law.

Had there been actual fact-finding in this case, Petitioner and the state courts would have been confronted with the State's own data showing that sales and use tax revenue has not only grown every year for the past seven years, but it has grown at a substantially higher rate than the South Dakota economy.[27]

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[26] Larry Kavanagh & Al Bessin, *The Real-World Challenges in Collecting Multi-State Sales Tax*, TRUST, 3 (Sept. 2013), http://truesimplification.org/wp-content/uploads/Final_TruST-COI-Paper-.pdf.

[27] South Dakota Bureau of Finance and Management, General Fund Condition Statement (2017), https://bfm.sd.gov/budget/rec18/SD_Rec_2018_Entire.pdf; South Dakota Department

South Dakota Sales and Use Tax Revenue 2013-18
(in millions)

2013	2014	2015	2016	2017	2018
$787.7	$831.1	$836.5	$860.9	$974.7	$1,013.1*

The Governor's budget for 2018 projects that South Dakota's sales and use tax revenue will be *29% higher* than just five years prior.[28] The compound annual growth rate in sales and use tax revenue for the five years ending in 2016 is over 5%, compared to a compound annual growth in state GDP during that period of just 1%.[29]

This is the "brutal" revenue "shortfall" described by Petitioner.[30]

There are many reasons for South Dakota's current economic woes, including recurrent droughts

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of Revenue Annual Reports, 13 (2015 and 2016), http://dor.sd.gov/Publications/Annual_Reports/. These are State-level data only. Sales and use taxes collected by South Dakota cities are proportional on an annual basis. Inclusion of these amounts would increase the amounts in the above table by approximately one-third. *2018 figure is the State's budget estimate.

[28] South Dakota Bureau of Finance and Management, General Fund Condition Statement (2017), *supra*. Effective for the second half of 2016, the State increased its sales tax rate by 0.5%.

[29] *South Dakota GDP*, DEPARTMENT OF NUMBERS, http://www.deptofnumbers.com/gdp/south-dakota/ (reporting data from Bureau of Economic Analysis, U.S. Department of Commerce).

[30] Pet. at 14.

that have hurt agricultural production.[31] But State sales tax revenues are growing, not declining, contrary to the "findings" in the South Dakota law.[32] This is another reason that the lack of any factual record in this case makes it a poor vehicle for overturning *Quill*.

C. Since *Quill* and *DMA II*, 'Changed Circumstances' Have Made 'Brick-and-Click' Ubiquitous, Negating South Dakota's Claims of Harm to 'Brick-and-Mortar'

When Justice Kennedy wrote his concurrence in *Direct Marketing Association* v. *Brohl*, he could speak of "the dramatic technological and social changes" driving the growth of e-commerce as distinct from "brick-and-mortar" retail.[33]

Then, Amazon was the paradigm of the internet retailer. Today, with a substantial physical presence in all 46 U.S. States with a sales tax, Amazon is the paradigm not just of internet retail but of all U.S. retail. Amazon by itself accounts for over 40% of all online retail sales,[34] yet at the same time, its warehouses, fulfillment centers, grocery stores and

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[31] South Dakota Bureau of Finance & Management, Economic and Revenue Update (July 2017), https://bfm.sd.gov/econ/current.pdf.

[32] Even if tax revenues *were* falling, which they are not, South Dakota would have a difficult time establishing causation, giving the myriad other factors currently depressing its regional economy.

[33] 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring).

[34] *Amazon Accounts for 43% of US Online Retail Sales*, BUS. INSIDER (Feb. 3, 2017, 12:12 PM), http://www.businessinsider.com/amazon-accounts-for-43-of-us-online-retail-sales-2017-2.

Pop-Up stores have made it into a local retailer in markets across the country.

Today, Amazon is putting pressure not just on established retailers but also on grocers, food delivery companies, fashion vendors and any number of other businesses. It has shown the importance of an e-commerce component to every retail business in every market. Those competitors who are not adapting are likely to go the way of Woolworth's, Sears, and Kmart. "Brick-and-mortar" may be threatened at the hands of Amazon, but not because of Amazon's sales tax advantage. It pays sales taxes in every State with a sales tax.

When, the year following Justice Kennedy's opinion, then-Judge Gorsuch wrote his concurrence in *DMA II*, he could still speak intelligibly of remote internet sellers and their "in-state brick-and-mortar rivals."[35] At the time, Walmart was the paradigm of brick-and-mortar retailing. Its sales that year exceeded $500 billion, making it the largest retailer in the country by far.

Today, the landscape of retail has changed. Walmart is competing head-to-head with Amazon in e-commerce. It is projecting a 40% increase in online revenue through 2019, while its overall revenue will grow only 3%.[36] Amazon's other closest competitors for online sales, like Walmart, also have retail stores

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[35] *Direct Mktg. Ass'n* v. *Brohl*, 814 F.3d 1129, 1150 (10th Cir. 2016) (Gorsuch, J., concurring).

[36] Phil Wahba, *Walmart Says Its Online Sales Will Explode Next Year Amid War With Amazon*, FORTUNE (Oct. 10, 2017), http://fortune.com/2017/10/10/walmart-says-its-online-sales-will-explode-next-year-amid-war-with-amazon.

nationwide. Companies such as Apple, Target, and Macy's all have large online businesses as well as physical stores across the country, and already charge sales tax for virtually all their customers. These four entities alone accounted for two-thirds of the $220 billion of internet retail sales in 2016.[37]

At the same time, nearly all small retail businesses also sell via their own websites. Of those that do not, 92% report they plan to do so by the end of 2018.[38]

The paradigm "brick-and-mortar" store is thus increasingly rare. It has been replaced by "brick-and-click." The competition in retail today is not between in-state brick-and-mortar stores and remote internet sellers. It is between retail giants and small businesses. Those small businesses—in South Dakota and elsewhere—can only compete if they are not overwhelmed with a nationwide tax compliance burden simply by virtue of selling via the internet.

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[37] Arthur Zaczkiewicz, *Amazon, Wal-Mart and Apple Top List of Biggest E-Commerce Retailers*, WOMEN'S WEAR DAILY (Apr. 2017), http://wwd.com/business-news/business-features/amazon-wal-mart-apple-biggest-e-commerce-retailers-10862796; "Target Report Q3 2017 Earnings," TARGET.COM (Nov. 15, 2017), http://investors.target.com/phoenix.zhtml?c=65828&p=irol-newsArticle&ID=2317059.

[38] *What Percentage of Small Businesses Have Websites?*, SMALLBUSINESS.COM (Mar. 18, 2017), https://smallbusiness.com/digital-marketing/how-many-small-businesses-have-websites/.

IV. CONGRESS, NOT INDIVIDUAL STATES OR THE COURTS, IS BEST SUITED TO DEVISE A SOLUTION TO THESE COMPLEX MULTISTATE TAX POLICY ISSUES.

It is South Dakota's desire to expand sales tax collection responsibilities to all retail businesses, even the very small and very remote. This is, indeed, a clear desire of most States, because they believe it will protect local businesses from unfair remote competition while increasing their tax revenue.

Precisely because this is the aim of many States, their collective ambitions pose a threat to cross-border commerce. The development of e-commerce motivated Congress in the ITFA to warn of the inherent danger of multiple State regulators. It is a danger made more acute because of the ease with which a small business in one location can, via the internet, reach the entire United States.

Because a reversal of *Quill* would immediately apply to all States, the new burdens placed upon the remote seller will not be just those of South Dakota. Multiple States and their many taxing jurisdictions would also tax and regulate the remote internet seller with a single place of business. Maintaining a retail website would quickly subject its owner to audit in 46 States. These are burdens not borne by the in-state seller.

Congress, which is not limited to deciding cases, has more nuanced alternatives. It has been actively exploring a variety of ways to more elegantly solve these interdependent problems. One approach, outlined in the ITFA and addressed by the

commission authorized in the law, would require that States first harmonize their sales tax regimes. Then, with a simplified sales tax regime for online commerce in place nationwide, Congress would authorize States to enforce collection beyond their borders. The States, as noted, have not done this, but Congress could require it as a condition of permitting extraterritorial tax enforcement.

Another approach, now under active consideration in the Congress, would force remote sellers to collect, but permit them to comply by following their own State's rates and rules. The taxes collected would be paid to the seller's State, which would then remit it to the purchaser's State. Through an interstate compact authorized by Congress, the amounts due among States would be netted monthly, simplifying the distribution process. Under this system, the seller would be subject to audit only in those States where it is physically present, rather than in every one of 46 States.

Unlike the Court, Congress can actively monitor developments in the marketplace and in technology. It can craft legislation aimed at striking the right public policy balance in this rapidly evolving landscape. That this is precisely what Congress is now doing counsels strongly against the course Petitioner urges.

A final note. Subjecting out-of-state sellers to Chapters 10-45 and 10-52 of the South Dakota Codified Laws means they can be required to travel to South Dakota to appear before its auditors, its administrative tribunals, and its courts. However workable this might seem when the arrangement

involves only two States (the seller's and the purchaser's), it quickly becomes unreasonable when multiple States are involved.

The result will violate bedrock principles of due process and minimum contacts. To satisfy the Due Process Clause's requirement of minimum contacts, the actions of "defendant *himself*" must establish a relationship "with the forum State," not merely with individuals within the State. *Walden* v. *Fiore*, 134 S. Ct. 115, 1121-22 (2014) (quoting *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 475 (1985)).

An out-of-state seller may establish contact with an individual South Dakota purchaser, but that does not show any relationship with the State itself. If it did, then everyone who sells online and ships anywhere in the United States would have minimum contacts with every State under the Due Process Clause—a proposition this Court has rejected. See *Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 298 (1980).

Far from providing an appropriate vehicle for this Court to reconsider its holding in *Quill*, Petitioner's recommended course of action will solve one purported problem by creating many much larger ones. The wiser course is for this Court to recognize that Congress is currently active in this area and continues to exercise its Article I authority—as it already has done multiple times in the ITFA—to develop appropriate national policy.[39]

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[39] See *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 637-38 (1981) (White, J., concurring) ("[T]he better part of

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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wisdom and valor is to respect the judgment of the other branches," even where Congress is "aware" of the Commerce Clause matter and "is so far content to let the matter rest." See also *Blum* v. *Caldwell*, 446 U.S. 1311, 1317 (1980 (denying motion to stay mandate pending certiorari where "Congress is presently considering legislation" to address the issue); *Coit Indep. Joint Venture* v. *Fed. Sav. & Loan Ins. Corp.*, 489 U.S. 561, 592 (1989) (Scalia, J., concurring) (noting Court should have deferred to issues to the "legislative process," where "Congress is currently considering legislation."